BOOK REVIEWS.

THE COURTS, THE CONSTITUTION AND PARTIES. By Andrew C. McLaughlin, Professor of History in the University of Chicago. Chicago: University of Chicago Press, 1912, pp. vi, 299.

This book is a series of five papers, four of which have appeared in as many magazines or learned reviews. The other paper which is much the longest and in some respects, the most important is now published for the first time. But the papers all relate to important phases of our constitutional government as it has developed with usage, and to the extra-constitutional machinery, by means of which the paper draft of the organic law, with its grants of power, its principles and its limitations, is made the instrument of actual government. The papers then not only relate to the same central theme, but they follow each other in logical development; and the importance of the subject with which they deal, and the scholarly ability and originality with which that subject is treated, amply justify their publication as a book.

The "power of a court to declare a law unconstitutional" is the subject of the first and hitherto unpublished paper. The author disclaims any purpose either to defend the courts in the exercise of this power, or to assert that they have assumed or usurped authority; rather he undertakes to trace in a broad way the historical facts which preceded and "which will explain, if it does not justify" the exertion of that power. After a brief review of Marshall's opinion in *Marbury* v. *Madison*,[1] Professor McLaughlin states the problem as follows: "But of course the mere fact that there was written constitution in America did not necessarily imply as a logical fact the right of the court to apply that constitution and ignore the interpretation of the Constitution by the legislative authority; that the Constitution was a law in the sense that it could be and must be maintained by the courts, even when Congress in exercising its legislative power had itself interpreted the Constitution, was the very point at issue. The thing then to be explained is why Marshall assumed that if the Constitution was law, the courts must place their interpretation on it and not recognize the right of the legislative body to determine its own rights under it." It is then contended that the Constitution itself does not explicitly or expressly answer the question, but that the explanation "must be sought in the historical background, not in mere logical disquisition on the Constitution alone." The antecedents (the author considers them antecedents rather than precedents) are then considered, and there are more of them than is generally supposed, and many other interesting facts are brought to bear upon the problem. Thus, as is well known, James Wilson of Pennsylvania, in lectures delivered in 1791 and 1792, "fully developed the doctrine that the court had a right to declare a law unconstitutional," and that this right is inherent in courts under a constitutional government with a separation of the great governmental pow-

[1] 1 Cranch 137 (1803).

ers. It is scarcely necessary to say that Wilson greatly influenced his contemporaries in legal and governmental matters. Moreover it is shown that there were several members of the Constitutional Convention, who as state judges had already officially declared statutes invalid. The author concludes his review of the earlier cases with a statement of the striking fact that the judges who decided those early cases were not acting strictly upon precedent, that commonly they did not even refer to precedents, but that "they thought *alike* and along *similar* lines," and this in many cases at least, without any knowledge of each other's or previous decisions. This condition was due of course to the delay in publishing reports and the scarcity of reports (blessed condition!) in those days. This is the foundation of the main thesis, namely that the history of the colonies and the states and particularly the philosophico-political theories entertained very generally by the leaders of our revolutionary and early constitutional periods made it very natural if not indeed inevitable that the possession by the courts of the power to declare legislation unconstitutional should be accepted as the natural and logical consequence of the nature of courts and of our form of constitutional government. The significance of the facts thus barely referred to, is nowhere else as clearly pointed out, as in Professor McLaughlin's paper. The importance of the provision in Article VI of the Constitution by which it is declared that the Constitution is the Supreme *law* of the land is also convincingly shown. How important to the *working* of our legal institutions this power is, had already been shown by Professor McLaughlin in his book on the Constitutional period.[2] The great influence of the revolutionary doctrines concerning "fundamental law," "natural rights," the "separation of powers" and the "compact" theory of the state in preparing men's minds for the application of the inherent power, and duty of courts to apply that which is law, and to refuse to apply that which is not, to litigation arising under the Constitution and our dual government is clearly and convincingly traced. It would be vain to endeavor to compress this scholarly and masterly argument into the brief space of a book review. The essay as a whole is not only a distinct contribution to the discussion of the resurrected political issue, but to the reviewer's mind, the "explanation of Marshall's position" (see p. 10) is a complete vindication of that position and as nearly conclusive of the existence, *de jure,* of the power in dispute, as it is possible to make.

The next two chapters, entitled, "The Significance of Political Parties" and "Political Parties and Popular Government" show the necessity for some dynamic force to put in motion and to operate the government which is outlined in the Constitution, and that this motive power has been found in our political parties, which from mere voluntary and shifting organizations have developed through extra-legal stages to their present definite though complex forms, not only recognized by law, but relied upon by it to express the will of the people, in short to furnish, to be, the actual government. This the author says (p. 113) was the great political and constitutional problem of the decades to come, and clearly enough, if we omit the tremendous

[2] McLaughlin, The Confederation and the Constitution, ch. XV.

struggle over slavery and secession, the development of these associations is the greatest fact in our constitutional history. It is a sorry thought that the development of this great democratic institution, the party, the "machine" if you please, should, even after a century and a quarter, be accompanied by such wretched and sordid spectacles as our Lorimers and Sulzers and our Tammany Murphys afford. But the reading of these chapters tends to give a philosophic tolerance of, and indeed a feeling of hopefulness about a system, which too often displays only its selfish and unpatriotic sides.

The final chapters, "Social Compact and Constitutional Construction" and "A Written Constitution in Some of Its Historical Aspects" discuss, to quote from the preface, "the changing theories of political philosophy, . . . which furnished foundations for differing theories concerning the Union, . . . and show that American legal order took its rise in the theory of compact and of individual right, and in the belief that imperial order itself should rest on law—two theories or principles that now confront the reformer seeking to readjust social systems and to make them conform to what he considers present social demands."

The book as a whole shows a sanity of judgment, historical scholarship and grasp of legal principles quite unequalled among other writers upon this phase of our historico-legal development. H. M. B.

THE FOURTEENTH AMENDMENT AND THE STATES. By Charles Wallace Collins, M.A., Sometime Fellow in the University of Chicago; Member of the Alabama Bar. Boston: Little, Brown and Company, 1912, pp. xxi, 220.

This is a valuable study of the Fourteenth Amendment to the Federal Constitution, and especially of the restraint clauses of section one. In an historical introduction which is not without some partisan bias, the conditions leading to the adoption of the Amendment are described and the purposes sought to be thereby accomplished by the Republican party are declared to be principally the complete subordination of the states to the federal government in all civil and political matters, the "punishment of the South," the "elevation of the negro to the plane of equality with the white race," and the perpetuation of the powers of the Republican party. Unquestionably the radical wing of that party desired to accomplish some and perhaps all of these purposes. At least such desire may be attributed to many individuals in the radical wing, but such motives cannot be truthfully ascribed to the North or even to the Republican party as a whole. The author then shows how the Supreme Court in the *Slaughter House Cases*,[1] in *U. S.* v. *Cruikshank*,[2] and in *Barbier* v. *Connolly*,[3] rejecting the extreme interpretation urged upon it, which would have vastly increased the centralization of government at the expense of, if not entirely obliterating local government as to civil and political rights, adopted the conservative view set forth in the

[1] 16 Wall. 36.
[2] 92 U. S. 542.
[3] 113 U. S. 31.